

Internal Revenue Service

Number: **201118011**

Release Date: 5/6/2011

Index Number: 1362.02-03

Department of the Treasury

Washington, DC 20224

[Third Party Communication:

Date of Communication: Month DD, YYYY]

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B01

PLR-134455-10

Date:

January 10, 2011

Legend:

X =

Sub 1 =

Sub 2 =

LLC =

Year 1 =

Year 2 =

Date 1 =

State =

a =

b =

c =

d =

Dear :

This letter responds to your letter, on behalf of X, dated August 5, 2010, and subsequent correspondence, requesting a ruling that X's rental income from its rental activities is not passive investment income within the meaning of § 1362(d)(3)(C)(i) of the Internal Revenue Code.

Facts

The information submitted states that X was formed in Year 1 in accordance with the laws of State. X wholly owns two subsidiaries, Sub 1 and Sub 2, and is a member of LLC, treated as a partnership for federal tax purposes (Sub 1, Sub 2, and LLC are collectively referred to as the Companies). X, Sub 1, Sub 2, and LLC own, lease, and manage real estate (the Properties). X, Sub 1, Sub 2, and LLC have a tenants, none of which are under net leases. X intends to elect to be treated as an S corporation for federal income tax purposes effective Date 1 and to make qualified subchapter S subsidiary elections for Sub 1 and Sub 2 effective Date 1.

X employs b full-time employees who directly perform services relating to the Properties. X also contracts with independent contractors to provide various services. X, through its employees or through the independent contractors, provides certain services with respect to the Properties, including: property inspection, common area maintenance and repair, including carpeting and painting; janitorial and cleaning services; maintenance and repair of building structural components, including roofs and facades; upkeep and repair of building systems (heating, air conditioning, plumbing, water and sewer, electrical and lighting); parking lot maintenance; landscape maintenance; snow removal; trash collection; pest control; providing security personnel; and the approval and supervision of capital improvements. X, Sub 1, Sub 2, and LLC or independent contractors also perform leasing and administrative functions, including: purchasing and developing new properties; negotiating and drafting individual leases; showing properties to prospective tenants; and hiring and supervising personnel assigned to perform the property management functions.

In Year 2, X collected approximately \$c in gross rents and incurred approximately \$d in relevant operating expenses.

Law and Analysis

Section 1361(a)(1) defines an "S corporation" as a small business corporation for which an election under § 1362(a) is in effect for the taxable year.

Section 1362(d)(3)(A)(i) provides that an S corporation election shall be terminated whenever the corporation (I) has accumulated earnings and profits at the close of each of 3 consecutive taxable years, and (II) has gross receipts for each of such taxable years more than 25 percent of which are passive investment income. The termination is effective on and after the first date of the first taxable year beginning after

the third consecutive taxable year referred to in § 1362(d)(3)(A)(i). Section 1362(d)(3)(A)(ii).

Except as otherwise provided in § 1362(d)(3)(C), § 1362(d)(3)(C)(i) provides that the term “passive investment income” means gross receipts derived from royalties, rents, dividends, interest, annuities, and sales or exchanges of stock or securities.

Section 1375(a) imposes a tax on the income of an S corporation if the S corporation has (1) accumulated earnings and profits at the close of such taxable year, and (2) gross receipts more than 25 percent of which are passive investment income.

Section 1362(d)(3)(C)(i) provides that, except as otherwise provided, the term “passive investment income” means gross receipts derived from royalties, rents, dividends, interest, annuities, and sales or exchanges of stock or securities.

Section 1.1362-2(c)(5)(ii)(B)(1) defines “rent” as amounts received for the use of, or right to use, property (whether real or personal) of the corporation.

Section 1.1362-2(c)(5)(ii)(B)(2) provides that the term “rents” does not include rents derived in the active trade or business of renting property. Rents are derived in an active trade or business of renting property only if, based on all the facts and circumstances, the corporation provides significant services or incurs substantial costs in the rental business. Generally, significant services are not rendered and substantial costs are not incurred in connection with net leases. Whether significant services are performed or substantial costs are incurred in the rental business is determined based upon all the facts and circumstances including, but not limited to, the number of persons employed to provide the services and types and amounts of costs and expenses incurred (other than depreciation).

Conclusion

Based solely on the facts and representations submitted, we conclude that the rental income that X derives from the Properties is not passive investment income as described in § 1362(d)(3)(C)(i).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed concerning whether X is a small business corporation eligible to make an S corporation election. Further, the passive investment income rules of § 1362 are completely independent of the passive activity rules of § 469; unless an exception under § 469 applies, the rental activity remains passive for purposes of § 469.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Pursuant to the power of attorney on file with this office, a copy of this letter will be sent to the taxpayer's representative.

Sincerely,

David R. Haglund

David R. Haglund

Chief, Branch 1

Office of Associate Chief Counsel

(Passthroughs & Special Industries)

Enclosures (2)

Copy of this letter

Copy of this letter for § 6110 purposes

cc: